Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1992

A. SHIEH,

Petitioner,

vs.

MICHAEL NEWMAN, et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Californial(United States Court of Appeals for the Ninth Circuit)

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Whether California dismissal rules as applied in the present case conflict in their effect with the objectives of federal civil rights law and are therefore inapplicable to Petitioner's civil rights lawsuit ?

ALL PARTIES TO THE PROCEEDING

PLAINTIFF and PETITIONER:

A. Shieh.

DEFENDANTS and RESPONDENTS:

Michael Newman; John B. Power; Stephen Pepe; Stewart P. Tobiasman; James H. Demeules; Barton Beek; Bradbury R. Clark; Warren Christopher; and O'Melveny & Myers.

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1992

A. SHIEH, Petitioner

v.

MICHAEL NEWMAN, Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF CALIFORNIA

To the Honorable William Rehnquist the Chief Justice and Associate Justices of the Supreme Court of the United States.

A. Shieh, the petitioner herein, prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on

December 30, 1992.

I. OPINION BELOW

The opinion of the Supreme Court of California dated December 30, 1992, which denied the petition for review is unreported and is attached in Petitioner's Appendix, page 23. The judgment of the Court of Appeal dated September 16, 1992, which affirmed the trial court dismissal order is attached in Appendix, page 24. The Journal Entry of Judgment of the Superior Court of Los Angeles County dated April 12, 1991, which granted defendants' motion to dismiss the action for delay in prosecution is printed in Appendix, page 34.

II. JURISDICTION

The judgment of the Supreme Court of California (Petitioner's Appendix, page 44) was entered on December 30, 1992, which denied Petitioner's petition for review of a case involving federal civil rights law, constitutional issues and other Federal Law. Under 28 U.S.C.A. §1257(a), 28 U.S.C.A. §1651(a) and the Supreme Court Rule 10.1(c), this Court will review a state judgment by writ of certiorari, if "a state court ... has decided an important question of Federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court."

III. FEDERAL LAW INVOLVED

A. Federal civil rights law, 42 U.S.C. § 1981 and Civil Rights Act of 1991, guarantees an individual's right to be free from racial discrimination in specific activities, such as making contracts and bringing suit. California dismissal rules as applied in the present case are inconsistent with the objectives of federal civil rights law and should be preempted under the Supremacy Clause.

B. The Sudden Adoption of the "Fast Track Program" by Judge Montes of the Superior Court without notice and adequate hearing violates Petitioner's rights to due process of law.

C. The dismissal of Petitioner's

case, while allowing a vast majority of other cases in Pasadena to be tried in five years, violates Petitioner's equal protection.

IV. STATEMENT OF CASE

Plaintiff and Petitioner Antony Shieh (hereinafter "Petitioner") was terminated by the law firm of O'Melveny & Myers (hereinafter "OMM") in December 1986. Petitioner then filed an administrative complaint with the Fair Employment and Housing Department for wrongful discharge. While the administrative proceeding was pending, Petitioner, on December 4, 1987, filed a civil suit against OMM. One month later, Petitioner filed an amended complaint against Defendants and Respondents ("Respondents") for, among

other things, discrimination based on race, color, national origin, ancestry, physical handicap and retaliation.

Defendants were provided with a copy of the first amended complaint soon after it was filed in January 1988. They immediately undertook an extensive investigation, with which Petitioner cooperated, and engaged in settlement negotiations over a period of several months which led to a settlement offer in November 1988. The offer was rejected. Defendants had made recommendations for amendments to the complaint in order to avoid the necessity of a demurrer and motion to strike following service.

There followed a period of just under two years -- from November 28,

1988 to November 20, 1990 -- during which time no pleading was filed. In early November, 1990, Respondents were served with the First Amended Complaint. Petitioner then commenced discovery. Upon request, Petitioner's lawyer granted Respondents several extensions of time to respond to the original complaint and First Amended Complaint and discovery. Instead of responding to the complaint and discovery, Respondents brought a motion to dismiss in mid January 1991.

At approximately the same time, Petitioner's lawyer filed a motion to withdraw as Petitioner's lawyer. The motion to withdraw was granted.

Historically, Pasadena Superior Court had not adopted the fast track

program and instead adopted the five-year trial/dismissal program. Virtually all cases were brought to trial within five years except simple cases. The Pasadena Superior Court was so crowded that it was unable to take cases to trial which were less than four years old. When Judge Richard Montes was appointed as supervising judge in the Pasadena Superior Court , he secretly adopted the "Fast Track Program" and applied the two-year rule and the three-year rule concerning dismissals, instead of the five-year rule, without notice to Petitioner. In fact, the Pasadena Superior Court did not adopt the fast track program until July, 1992, one year and three months after Petitioner's case was dismissed. Petitioner requests this court to take judicial notice of the historical facts of the Pasadena

Superior Court and the formal time of implementation for its adoption of the fast track program. A copy of the adoption of the fast track program is attached hereto and incorporated herein PA, at Appendix, page 69.

Petitioner was waiting for more appropriate offers for settlement and investigating this action during the two year period. On April 12, 1991, the trial court granted Respondents' motion, and Petitioner's action was dismissed with prejudice for lack of prosecution. After his motion for reconsideration was denied, Petitioner appealed to the state appellate court. His efforts on appeal were unsuccessful. Petitioner then filed a petition for review with the Supreme Court of California, and the petition was denied on December 30,

1992.

V. REASONS FOR GRANTING WRIT

A. VIOLATION OF FEDERAL CIVIL RIGHTS LAW

1. The California Procedural Rules Giving Judges Unlimited Discretion to Order Dismissal Is Inconsistent with Federal Civil Rights Law.

Petitioner's cause of action includes a claim of racial and ethnic discrimination as well as discrimination on the basis of color, national origin, ancestry and physical handicap under federal civil rights law. He claims that he was discharged from OMM because of the above discrimination pursuant to

the federal civil rights statute. One of our federal laws provides that:"[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,.....", "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and impairment under color of state law conditions of the contractual relationship", "[t]he rights protected by this section are protected against impairment by non governmental discrimination and impairment under the

color of state law." 42 U.S.C. §1981 provides similar protection.

Petitioner contends that OMM violated his civil rights under 42 U.S.C. § 1981 and The Civil Rights Act of 1991, which prohibits discrimination by private parties. Petitioner's federal discrimination claims have been made in good faith and supported by substantial evidence (Petitioner's First Amended Complaint, cause of action Number (4) was entitled "Discrimination and Wrongful Termination"). But for the dismissal of this action, Petitioner would have amended the First Amended Complaint to add the Civil Rights Act of 1991 and other federal law as additional causes of action. Scarlett v. Seaboard Coast Line R. Co., 676 F. 2d 1043 (1982)(the elements for showing job discrimination are (1) he belonged to a

racial minority; (2) he was qualified for a job for which the employer was seeking applicants; (3)despite his qualifications, he was rejected, and (4) after his rejection, the employer continued to seek applicants from persons of complainant's qualifications.

In a similar case, Gates v. ITT Continental Baking Co., 581 F. Supp. 204 (D.C.Ohio 1984), a civil rights complainant, who was a black employee was discharged by his employer. The complainant claimed that he was treated in a manner differently than white employees and the difference in treatment was found to be a result of purposeful, intended discrimination on the basis of his race. The court ruled against the employer for violation of employee's rights under Title VII and

ordered the employer to reinstate the employee and give him his back pay.

Mr. Shieh has asserted a federal civil right, namely, a right not to be discriminated based on his national origin. "[T]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Brown v. Western R. Co. of Alabama, 338 U.S. 294, 298-99 (1949). Fisher v. Civil Service Comm. of Salt Lake City, Utah, 484 F. 2d 1099 (1973)(actions presented with both local and federal claims are reviewable by the U.S. Supreme Court).

California dismissal rules as the state courts applied them in this case are repugnant to Congressional aims in civil rights legislation. First, California civil procedure gives state

judges immense discretion to determine whether an action should be dismissed because of delay in service or prosecution. Under California Code of Civil Procedure § 583.410, a trial judge may dismiss a case for lack of prosecution upon discretion. Such discretion was traditionally not used by the judges in the Pasadena Superior Court. Instead, the Pasadena Superior Court adopted the five-year rule.

While California Rules of Court, Rule 373(e) lists relevant factors in making a decision, it does not indicate the appropriate weight to be given the various factors listed. Because state courts are left to rely upon their discretion in individual cases, the same or similar situations could be treated differently. Compare, County of Los

Angeles v. Superior Court, 208 Cal.App.3d, 1205, 1209, 250 Cal.Rptr. 481 (1988) (investigation or procurement of evidence does not excuse a long unexplained delay in serving the complaint) with Cubit v. Ridgecrest Community Hospital, 194 Cal.App.3d 1552, 1567-1569, 240 Cal.Rptr. 346 (1987) (investigation as to cause of death excused a 35-month delay in service).

When the same unfettered discretion applies to federally created rights, there is a great danger that a Congressional remedial scheme would be frustrated. As a result of state judges' discretion to dismiss for delay in service or prosecution, the enforcement of federal civil rights law "will frequently and predictably produce different outcomes ... based solely on

whether the claim is asserted in state or federal court". See Felder v. Casey, 487 U.S. 131, 138 (1987). That is a sufficient ground for preempting California dismissal rules. Id.

In the present case, the state trial court clearly failed to examine the totality of circumstances when determining whether dismissal was appropriate. The court's disregard of various reasons for Petitioner's delay inadequately accommodated the complexities of federal civil rights litigation. See, Burnett v. Grattan, 468 U.S. 42, 50-55 (1984)(adoption of state statutes of limitations which provide fixed period of time within which to file suit disapproved). There is no indication that Congress intended civil rights lawsuits to be actively

prosecuted within a fixed time regardless of circumstances that may cause some delay. To impose such time limit through state procedure and practice undermines the remedial scheme of federal civil rights law and is inconsistent with the legislative objectives. Wilson v. Garcia, 471 U.S. 261, 279 (1985).

2. California Courts Interpreted and Applied Procedural Rules in A Way to Discriminate Against a Federal Right

California dismissal rules are inadequate when applied to Petitioner's federal civil rights claims and also because of confusion and its lack of clarity. California Code of Civil Procedure section 583.210 (a) provides:

"The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed."

Under this provision, Petitioner could serve Respondents within three years. Petitioner's service was timely. But section 583.420 (a) provides that a court may dismiss an action if "service is not made within two years after the action is commenced against the defendant." This section served as a ground for the state trial court's dismissal of Petitioner's action. Rule 373 of the California Rules of Court authorizes a trial court to dismiss an action if the action has not been

brought to trial within the time limits set forth in the alternatives of the California Code of Civil Procedure. Although Respondents cited both C.C.P. §583.410 and 583.420. The only ground for Respondents' dismissal motion is the service of Petitioner's First Amended Complaint. The service itself was done within C.C.P. §583.210's statutory time limit and should not be manipulatively used as evidence to show delay in prosecution. How could a reasonable plaintiff know that four months after the service of his Amended Complaint the action could be marked as delay in prosecution and quickly dismissed?

The above dismissal statute is also inconsistent with C.C.P.§ 583.310, which provides "An action shall be brought to trial within five years after

the action is commenced against the defendant."

When facing with these apparently inconsistent rules, the state court chose the rule frustrating federally created rights. The way the state court interpreted and applied local procedures discriminates against the federal right. Felder, 487 U.S. at 141, 145-46.

In federal courts, actions would not have been dismissed for failure to prosecute absent evidence that plaintiff deliberately proceeded in a dilatory fashion or that it failed to honor its commitments, particularly considering strong public policy favoring adjudication on the merits [citing Fed. Rules Civ. Proc. Rule 4(b)], Gibbs v. Hawaiian Eugenia Corp., 771 F.Supp. 638

(S.D.N.Y. 1991). If the case were in federal court, it would have a better chance not to be dismissed. Freed v. Braniff Airways, Inc., 119 F.R.D. 10 (S.D.N.Y. 1987)(action pending for several years itself not ground for dismissal where plaintiff had not received any prior warnings that delay would occasion dismissal; defendant had not demonstrated any prejudice; and less onerous sanction was available, in light of plaintiff's assertion that she had pursued discovery...).

Justice Black stated in Link v. Wabash R. Co. 370 U.S. 626, 648-649 L.Ed.2d 734, 82 S.Ct.1386 (1962), 8 L.Ed.2d 734, 748, 82 S.Ct. 1386 (1962): "It is of course desirable that the congestion on court dockets be reduced in every way possible consistent with

the fair administration of justice. But that laudable objective should not be sought in a way which undercuts the very purposes for which courts were created - that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties. Where a case has so little merit that it is not being prosecuted, a trial court can of course properly dispose of it under fair constitutional procedures. .... When we allow the desire to reduce court congestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name."

California's conflicting independent

policies underlying dismissal statutes regrettably have resulted in confusion and a lack of uniformity in decisions made in this area of law. This confusion prejudices Petitioner's federal civil right claims. "The (California) Supreme Court decisions offer no guidance as to what quantum of showing is necessary for the plaintiff to meet his burden or as to what constitutes excuse or justification for delay." Putnam v. Clague, 3 Cal.App.4th 542, 5 Cal.Rptr.2d 25 (1992). Courts have expressed their frustration with California Supreme Court's role in establishing a sound, consistent dismissal rule:

"[T]here is a great need for consistency and uniformity in interpreting section 583(a). The statute permits perhaps the

most serious sanction which can be imposed on a plaintiff: dismissal of his cause of action. It should offend our sense of basic fairness to think that one plaintiff would have his case dismissed where on exactly the same set of facts, another plaintiff before a different trial judge would be allowed to proceed to trial." Hurtado v. Statewide Home Loan Co. (1985) 167 Cal.App.3d 1019, 1027, 213 Cal.Rptr. 712(1992).

By granting this Petition for Review, this Court can provide clearer constitutional guidelines to state courts regarding state dismissal rules affecting federal claims. See, Eddy v. Inland Bay Drilling & Workover, 784 F. Supp. 320 (S.D. Tex. 1992)(When state law conflicted with federal law, if the state court did not properly resolve the

conflict, plaintiff may seek relief in the U.S. Supreme Court).

3. Dismissal with Prejudice Exhibits Hostility towards Petitioner's Federal Civil Rights Claim

Finally, the state court departed from applicable law and dismissed petitioner's federal civil rights claim with prejudice. California Code of Civil Procedure section 581(d) and (g) provide that a dismissal should be ordered without prejudice unless "upon the trial and before the final submission of the case, the plaintiff abandons it." In the present case, dismissal, even if justified, should have been one without prejudice because the trial did not start. The state court's order of

dismissal with prejudice even departed from state law to discriminate against a federal claim. Again, the way the state court interpreted and applied the dismissal rule here manifested hostility towards federal civil rights law. Cooper v. State of California, 386 U.S. 58 (1967)(certiorari granted to consider whether California law conflicts with federal law).

This Court in Felder v. Casey, 487 U.S. 131, 138-153 (1988) held that Wisconsin's notice-of-claim statute is preempted when federal civil rights provisions are enforced. In Felder, the petitioner who is black alleges that some members of the Milwaukee police Department committed civil rights violations by beating him during a false arrest. The petitioner filed an action

in the state court against the city of Milwaukee and certain of its officers alleging the beating and arrest were racially motivated, and violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. Wisconsin has a statute which provides that before suit may be brought in a state court against a state or local governmental entity or officer, the plaintiff must notify the governmental defendant of circumstances giving rise to the claim, the amount of the claim, and his or her intent to hold the named defendants liable. The claimant must refrain from filing suit for 120 days after providing such notice. Failure to comply with these requirements constitutes grounds for dismissal of the action. The petitioner Bobby Felder's suit was dismissed as to

all state law causes of actions for noncompliance with the "notice-of-claim" statute. The Court of Appeals affirmed on the basis that the "notice-of-claim" statute was inapplicable to federal civil rights actions brought in state court. The Wisconsin Supreme Court, however, reversed based on a state's authority to prescribe the rules and procedures to govern actions in their own tribunals and the state legislative policy in protecting against stale or fraudulent claims, facilitating prompt settlement of valid claims, and identifying and correcting inappropriate conduct by governmental employees and officials. This Court granted certiorari and reversed.

The U.S. Supreme Court characterized the nature of the legal

issue in Felder as one of pre-emption: Is the application of the state notice-of-claim provision to a civil rights action brought in a state court consistent with the goals of federal civil rights laws, or does the enforcement of such a requirement instead stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress? Id. at 138. In the present case, the same question should be asked. If state courts entertain a federally created cause of action, the federal right cannot be defeated by the forms of local practice. The central objective of the civil rights laws is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. "Any assessment of

the applicability of a state law to federal civil rights litigation, therefore, must be made in light of the purpose and nature of the federal right." Id at 139.

"Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the state of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" (citing Free v Bland, 369 U.S. 663, 666 (1962)) Id. at 138. In Felder, because the notice-of-claim statute conflicts in both its purpose and effects with the remedial objectives of civil rights act §1983, and because its enforcement in such

actions will frequently and predictably produce different outcomes in civil rights litigation based on whether the claim is asserted in state or federal court, in Felder, the arbitrary state law was preempted. Id at 138.

Similarly, in the present case, Petitioner's cause of action includes a claim of discrimination based on his Chinese origin. Section 1981 is applicable to protect Petitioner's civil rights. The objective of §1981 is to protect individuals against impairment by nongovernmental discrimination and "to provide appropriate remedies for intentional discrimination and unlawful harassment in the work place" (See, legislative history of Section 3 of Pub. L.). California dismissal rules and their case law progeny as described

above are ambiguous, and its various provisions are on their face inconsistent. In Brown v. Western Ry., 338 U.S. 294, 296 (1949), this Court held that the federal right granted by Congress under the Federal Employer's Liability Act cannot be defeated by the form of local practice. In this case, because of the application of California dismissal rules, Petitioner lost his day in court to recover damages for civil rights violations committed by his former employer.

4. Petitioner's assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice

See, Brown v. Western R. Co. of Alabama, supra, at 298-299. "State

courts simply are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right." Felder, Id at 152. Further, In Norfolk W.R.R. Co. v. Liepelt, 444 U.S. 490, 492-494 (1980), it was held that "state rules that interfere with federal policy are to be rejected, even if they might be characterized as 'procedural'".

B. IMPLEMENTING THE FAST TRACK PROGRAM BEFORE THE EFFECTIVE DAY IS A VIOLATION OF DUE PROCESS OF LAW

California enacted the Trial Court Delay Reduction Act, California Gov. Code §68605.5, which provides a set of rules to establish a trial delay reduction or "fast track" program.

This program was first started as an exemplary program in a few superior courts during January 1, 1991 to July 1, 1992. Pasadena was not among those in the paradigm program. This program is generally applicable to all actions and proceedings in the superior courts on or after July 1, 1992. The Northeast District of Los Angeles Superior Court to which Pasadena belongs should apply the fast track program rules to cases filed on or after July 1, 1992. (See, Appendix, Notice to Attorney of Record re assignment to fast track program , at page 69). In a situation where a case is assigned to the fast track program, the plaintiff's counsel will receive a notice from the court to be alerted about the new timing standard and the danger of early dismissal for noncompliance with the new rules.

Petitioner's action was filed in 1987, when the fast track program had not been adopted in Pasadena. The date of filing and the location of the court in which the case is filed are the preconditions to determine if fast track rules should apply in the first place. Petitioner and his counsel were never notified that his action was assigned to the fast track program.

Although Petitioner's action was filed before the effective day of the fast track rules, the action was dismissed on November 14, 1991, as a part of the effort to prematurely and informally if not secretly implement the fast track rules by the Pasadena Superior Court, even though the fast track rules would not be in place until

July 1, 1992.

Judge Xanthos, another Pasadena Superior Court Judge once made a comment which admitted that the judges in Pasadena actually used the fast track rules, he said in April, 1992: "why we have fast track downtown and while we are adopting Rule 13 here in the Northeast District in which time limits are going to be set, is to insure that cases proceed on their merits ...". See, Appendix (7), at page 96; See also, Appendix (5) Judge Xanthos' statement in a hearing, attached Court record, at page 82. In a hearing regarding another case held on March 5, 1992, Judge George Xanthos admitted that downtown Los Angeles rather than Pasadena then (in March, 1992) had adopted a "fast track program", (See, Appendix Court record at

page 69).

Disregarding the law and practice, Judge Montes of Pasadena Superior Court secretly adopted the Fast track program to Petitioner's case which was filed long before the fast track program became effective in Pasadena. Under such circumstances, Petitioner, without receiving a notice that his case would be treated as one in the fast track program, had no way to know that the action would be subject to harsh fast track time limits and would therefore be marked as delay in prosecution. The dismissal resulting from the application of the fast track rules prior to its formal authorization therefore is in violation of due process of law.

C. SECRETLY APPLYING A FAST TRACK PROGRAM BEFORE ITS EFFECTIVE DATE IS A VIOLATION OF EQUAL PROTECTION

As required by the equal protection clause of the Fourteenth Amendment, Petitioner should not be treated differently in the Superior Court. As mentioned above, Petitioner's action should not be subject to the time limits of the fast track program, while other similarly situated cases pending in courts that had not adopted the fast track rules were not dismissed under the new time standard in 1991. Judge Montes' unlawfully used fast track rules without notice while such rules did not become effective until July 1, 1992. This dismissal of Petitioner's case violates his equal protection right.

Judge Montes' passion for an early implementation of fast track at the expense of Petitioner's constitutional right was evidenced in a few dismissal decisions made personally by Montes against Petitioner (See, attached Declaration of Jed Mark Silverstrom, at page 45). This personal favor toward fast track should not be tolerated if it leads to a violation of Petitioner's equal protection right under the U.S. Constitution.

In previous cases, California courts did not dismiss actions for delay in prosecution, if plaintiff could provide some explanation or excuse for the delay. Vecki v. Sorensen, 171 Cal. App. 2d 390, 393 (1959). In the present

case, Petitioner had asserted in the trial court that (1) there was no delay in prosecution; (2) assuming there is a delay, it should have been justified by valid reasons presented by Petitioner to the court. The Superior Court ignored the statutory provisions and case law authorities, and dismissed the action even if Petitioner had presented several valid reasons for alleged delay. This prejudicial treatment violates Petitioner's equal protection right, and this issue should be addressed by this Court.

VI. CONCLUSION

Petitioner seeks review on a writ of certiorari under the United States Supreme Court Rules, Rule 10.1(c). The California rule giving state judges unlimited discretion to dismiss for

delay in service or prosecution is impermissible in the determination of Petitioner's federal civil rights claim. It is inconsistent with the remedial scheme of federal civil rights law. The state courts' interpretation and application of California dismissal rules in this case discriminated against Petitioner's federal claim and should be preempted under the Supremacy Clause of the United States Constitution and Fourteenth Amendment due process of law and equal protection clauses.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 25, 1993.

[C:\L\NEWMAN\92S\PETWRI] 4B

Second Appellate District, Division Five, No. B059327
S029451

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

A. SHIEH, Appellant

v.

MICHAEL NEWMAN ET AL., Respondents

Appellant's petition for review DENIED

Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

A. SHIEH, Plaintiff and Appellant,	) B059327) Super.) Ct. No.
v.	) NEC53509)
MICHAEL NEWMAN et al., Defendants and Respondents.	)))

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Montes, Judge. Affirmed.

James L. Andion, L. Shieh and Lucien A. Schmit III for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, Kenneth W. Anderson and Jeffrey F. Webb for Defendants and Respondents.

The trial court dismissed appellant's lawsuit after he failed to justify the fact that his case lay dormant for years. (Code Civ. Proc., § 583.410.) We conclude that the trial court did not abuse its discretion by dismissing appellant's case, and affirm the judgment.

FACTS

On December 4, 1987, appellant Antony Shieh, an attorney, filed suit in propria person against respondent Michael E. Newman. Appellant also filed a claim with the Department of Fair Employment and Housing, alleging that his employment was wrongfully terminated on account of his national origin (he is Chinese) and his physical handicap (he has an impaired thumb), and in

retaliation for his complaints of discriminatory treatment.

One month later, an amended complaint was filed on appellant's behalf by the office of attorney Richard Tarlow, naming the remaining respondents as defendants.[1] The amended pleading alleges causes of action for breach of contract, misrepresentation, negligent infliction of emotional distress, wrongful termination, and breach of the implied covenant of good faith and fair dealing.

Attorney Tarlow sent respondents a courtesy copy of the amended complaint in April of 1988, to encourage

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1 The other respondents, in addition to Newman, are the law firm of O'Melveny & Myers, and O'Melveny partners John B. Power, Stephen Pepe, Stewart P. Tobison, James H. DeMeules, Barton Beek, Bradbury R. Clark and Warren Christopher.

settlement discussions. This led to an internal investigation, culminating in a settlement offer from respondents which appellant rejected in November of 1988.

The record shows no evidence of activity in the case from November of 1988 until late November of 1990, when summons was served.

Attorney Tarlow made a motion to withdraw as appellant's counsel in January of 1991. His declaration states that the motion was necessitated by appellant's refusal to cooperate and follow his counsel's advice, and by his insistence on dictating the course and timing of litigation. Tarlow stated that appellant would not respond to settlement offers made by respondents; refused to meet with him; would not

allow him to substitute out of this case despite Tarlow's requests to be relieved as counsel; and instructed him not to serve the summons and complaint or have discussions with respondents' counsel. Tarlow declared that there was a complete breakdown in the attorney-client relationship.

Appellant opposed Tarlow's motion to withdraw as counsel, insisting that Tarlow was not his attorney of record, and that there was a "conspiracy" between Tarlow, respondents, and respondents' counsel. Appellant asserted that all pleadings filed by Tarlow were unauthorized and should be stricken. He blamed respondents for not contacting him directly as a pro. per. litigant after his original complaint was filed. Tarlow's motion to withdraw

was granted on February 21, 1991.

In January of 1991, respondents moved to dismiss appellant's action for failure to prosecute. In his opposition, appellant conceded that his case had sat dormant for over two years, but asserted that the reason for this was that he and attorney Tarlow did not agree on how the case should be handled, and because appellant had taken several trips out of the country. Although appellant did not serve the complaint until days before the mandatory three-year statute expired, he noted that he had been actively litigating the case since retaining new counsel in January of 1991.[2]

---

2 Code of Civil Procedure section 583.210 requires that the summons and complaint be served within three years after the action is commenced. Appellant's suit, filed December 4,

Respondents' motion to dismiss for lack of prosecution was granted on April 12, 1991. The trial court awarded judgment and costs to respondents on April 24, 1991. Appellant's petition for reconsideration was denied after he filed his notice of appeal.

DISCUSSION

Code of Civil Procedure section 583.410 permits dismissal of an action for delay in posecution. Motions to dismiss are discretionary, and the exercise of that discretion will not be disturbed on appeal unless a clear case of abuse is shown. (Blank v. Kirwan (1985) 39 Cal.3d 311, 331.)

First, appellant argues that

1987, was not served on respondents until November 30, 1990.

respondents have unclean hands because they failed to cooperate in this case. There is no evidence of a lack of cooperation. Indeed, respondents were incapable of proceeding in the case until they were formally served as parties to the action. Appellant failed to serve respondents for nearly three years after filing his action, during which period respondents were barred from initiating discovery or undertaking other actions in the case. (Trailmobile, Inc. v. Superior Court (1989) 210 Cal.App.3d 1451, 1457.)

Second, appellant asserts that respondents "had adequate notice of the lawsuit" regardless of whether he had served it upon them, therefore they were not prejudiced by the three-year delay in prosecution. It settled that a

plaintiff who merely informs his prospective adversaries of the tendency of a lawsuit, or who sends them courtesy copies of the lawsuit, is not excuses from his duty to serve timely and prosecute diligently the lawsuit in order to avoid dismissal pursuant to Code of Civil Procedure section 583.110 et seq. (Bishop v. Silva (1991) 234 Cal.App.3d 1317, 1323-1324; Ladd v. Dart Equipment Corp. (1991) 230 Cal.App.3d 1088, 1101; Trailmobile, Inc. v. Superior Court, Supra, 210 Cal.App.3d at p. 1457.)

Third, appellant contends that respondents are estopped from obtaining a dismissal because their conduct lulled him into a false sense of security, causing him to let the case lie dormant for three years. The intent of the

parties should be reasonably enforced where they have stipulated to excuse diligent prosecution of the case, because such stipulations "dampen any sense of urgency" and "lull [] a sense of security against dismissal." (Garza v. Delano Union Elementary School Dist. (1980) 110 Cal.App.3d 303, 313; Farrar, Herrick & Associates v. Safecare Co. (1981) 115 Cal.App.3d 123, 131.)

No stipulations to delay prosecution were made in this case. Nor did respondents engage in affirmative conduct designed to mislead appellant into believing he had no need to serve his lawsuit and move his case forward. Respondents only made a settlement offer and, after it was rejected, indicated that they now "assumed" the case would be fully litigated. Their assumption

was not borne out by appellant's subsequent conduct, because he did not trouble to serve the complaint or initiate discovery for another two years after the settlement offer was rejected. Respondents could do nothing until appellant decided to formally commence proceedings against them with service of the summons. By merely waiting for this to occur, respondents did not engage in the kind of conduct necessary to establish an estoppel. Upon being served, respondents promptly moved for a dismissal, and did not allow the case to languish any longer. Any discovery initiated by either party following service of the summons did not excuse the preceding three-year delay in service and prosecution.

Fourth, appellant proposes that his

lawsuit should not have been dismissed because state policy favors the disposition of cases on their merits. (Code Civ. Proc., § 583.130.) It is clear that where the plaintiff offers no valid excuse or justification for a delay in prosecution, he cannot rely solely on the policy favoring trial on the merits to save his case from dismissal. (Sales v. Sears, Roebuck & Co. (1986) 42 Cal.3d 342, 347.) As can be seen in this case, appellant cannot offer a legitimate reason for his lengthy delay in serving and prosecuting his case; therefore, he cannot be saved by the policy favoring a trial on the merits.

There is, quite simply, no proof of diligence in this case. The internal memorandum generated by respondents

regarding appellant's claims of discrimination is not proof that appellant diligently prosecuted his case. Nor did appellant's courtesy copies of the complaint constitute a proper and timely services. The trial court could, and apparently did, conclude that the breakdown in the attorney-client relationship between appellant and Tarlow was appellant's doing, because appellant was dictating the timing and course of the litgation rather than allowing counsel any latitude in directing the litigation. Indeed, appellant denied ever hiring Tarlow as his attorney, insisted he was proceeding in propria persona, and asked that Tarlow's pleadings be stricken. Thus, appellant cannot blame Tarlow for any delay in prosecution: if appellant insists that he was the sole person

responsible for his case for the first three years, then he must bear all the responsibility for the inactivity during that period.

Neither the hiatus attributable to the illness of appellant's parents, nor his job change can excuse appellant's unexplained failure to proceed with his case for nearly three years. (House v. State of California (1981) 119 Cal.App.3d 861, 881.) Nor are we impressed by appellant's assertion that he spent two full years hoping respondents might make him a nice settlement offer. Our justice system would be crippled if litigants were permitted to sit on their rights, hoping to frighten an unserved defendant into making a settlement offer, until the final moments before dismissal is

mandated by statute. The discretionary dismissal statutes were enacted for the precise purpose of preventing litigants from shirking their duty to proceed.

In regard to appellant's argument that respondents were not prejudiced by his delay, it is clear that a protracted and inexcusable delay in service or prosecution relieves a defendant from the need affirmatively to establish prejudice. In such cases, prejudice is inferred from the delay itself. (Wagner v. Rios (1992) 4 Cal.App.4th 608, 612; Trailmobile, Inc v. Superior Court, Supra, 210 Cal.App.3d 1451, 1457.)

Appellant's remaining arguments -- including his legally unsupported assertion that respondents and respondents' counsel could never be

prejudiced by his three-year delay because they are big law firms, and his factually unsupported charge that the trial court used "fast track" rules as the basis for the dismissal-- are so unmeritorious that they do not bear discussion by this court.[3]

DISPOSITION

The judgment (order of dismissal) is affirmed. Respondents to recover their costs on appeal from appellant.

NOT TO BE PUBLISHED

BOREN, J.

We concur:

---

3 We deny appellant's apparent motion to augment the record on appeal with documents that are incomplete, lack foundation, and were not before the trial court.

TURNER, P.J.

GRIGNON, J.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE APR 12 1991 DEPUTY CLERK

HONORABLE RICHARD MONTES JUDGE
JUDGE PRO TEM ELECTRONIC
HONARABLE RECORDING
Deputy Sheriff MONITOR

NEC053509 Counsel for
SHIEH, ANTONY Plaintiff BRIAN N. BEYER

NEWMAN, MICHAEL-ET AL
Counsel for
Defendant GIBSON-DUNN-
CRUTCHER
By: KENNETH W. ANDERSON

NATURE OF PROCEEDINGS.

MOTION OF DEFENDANT MICHAEL NEWMAN ET-AL TO DISMISS FOR DELAY IN PROSECUTION

CF: 03-12-91

Motion is granted pursuant to CCP 583.410 et seq. for failure to bring action to trial within 3 years of its commencement. This action is dismissed

forthwith. The complaint was filed on 12-4-87 and the matter has not been brought to trial to date, a period of over 3 years and 4 months.

It is stipulated (not stipulated) that Commissioner _____ may hear of this matter as Judge Pro Tem(by moving party/responding party).

TRANSFERRED TO/FROM DEPARTMENT

Court disqualifies

170.6CCP affidavit

OFF CALENDAR On court's own motion

No Appearance

At Request of moving party

By stipulation

CONTINUED TO..... IN DEPT. ....

AT ..... AM PM

On court's own motion Stip. to be filed

☐ On oral/written stipulation.

☐ OSC Discharged

☐ REQUEST OF ☐ Moving party

☐ Respondent(s)

Per Ex Parte Order of

_____

☐ TRO to remain in full force and effect

TRO dissolved

☐ MOTION: ☐ granted as prayed

☐ denied

☐ with/without prejudice

☐ argued and taken under submission

☐ DEMURRER: ☐ sustained/ ☐ overruled

☐ with/without leave to amend

☐ ___ days to amend/answer

☐ JUDGMENT ☐ ORDER TO BE PREPARED BY:

☐ Moving party ☐ Responding party

☐ Clerk

☐ NOTICE: ☐ Waived ☐ By moving party

☐ By respondent(s)

☐ PETITIONER(S) IS/ARE SWORN AND TESTIFIES/TESTIFY

☐ PETITION IS GRANTED(AS AMENDED)

GIBSON, DUNN & CRUTCHER
KENNETH W. ANDERSON
DAVID W. BURCHAM
TERESA de CASTRO McNAMARA
JEFFEREY F. WEBB
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

Attorneys for Defendants
MICHAEL NEWMAN; JOHN B. POWER;
STEPHEN PEPE; STEWART P. TOBIASMAN;
JAMES H. DeMEULES; BARTON BEEK;
BRADBURY R. CLARK; WARREN CHRISTOPHER;
O'MELVENY & MYERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, NORTHEAST DISTRICT

ANTONY SHIEH,	) Case No. NEC 53509
Plaintiff,	) [PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR DELAY IN PROSECUTION
v.	
MICHAEL NEWMAN; JOHN B. POWER; STEPHEN PEPE; STEWART P. TOBIASMAN; JAMES H. DeMEULES; BARTON BEEK; BRADBURY R.	) Date: April 12, 1991) Time: 8:30 a.m.) Place: Department A) Discovery Cut-Off: none

CLARK; WARREN CHRISTOPHER; O'MELVENY & MYERS, a California partnership; and DOES 1 through 400, inclusive, Defendants.	) Motion Cut-OffDate:none) Trial Date:None

The motion of defendants Newman, et al. to dismiss for delay in prosecution came on regularly for hearing on April 12, 1991, at 8:30 a.m. in Department A in the above-entitled court, the Honorable Richard Montes, presiding. Kenneth W. Anderson appeared for the defendants, and Brian N. Beyer appeared for plaintiff.

After full consideration of all oral and documentary evidence introduced in this action, the Court finds good cause to grant defendants' motion to dismiss for delay in prosecution pursuant to

California Code of Civil Procedure § 583.410 and Rule 373 of the California Rules of Court. Because plaintiff failed to bring this action to trial within three years, plaintiff's original complaint, filed on December 4, 1987, and plaintiff's first amended complaint, filed on January 4, 1988, are hereby dismissed with prejudice.

IT IS ORDERED that defendants' Motion to Dismiss for Delay in Prosecution is granted, and the action is dismissed in its entirety.

IT IS FURTHER ORDERED that plaintiff shall pay all costs and disbursements incurred by defendants.

DATE: April 23, 1991

RICHARD MONTES

_____

Honorable Richard Montes
Judge of the Superior Court

GIBSON, DUNN & CRUTCHER
KENNETH W. ANDERSON
DAVID W. BURCHAM
TERESA de CASTRO McNAMARA
JEFFREY F. WEBB
333 South Grand Avenue
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Attorneys for Defendants
MICHAEL NEWMAN; JOHN B. POWER;
STEPHEN PEPE; STEWART P. TOBIASMAN;
JAMES H. DeMEULES; BARTON BEEK;
BRADBURY R. CLARK; WARREN CHRISTOPHER
O'MELVENY & MYERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, NORTHEAST DISTRICT

ANTONY SHIEH,	) Case No. NEC 53509
Plaintiff,	) [PROPOSED] JUDGMENT
v.	)
MICHAEL NEWMAN; JOHN B. POWER; STEPHEN PEPE; STEWART P. TOBIASMAN; JAMES H. DeMEULES; BARTON	) Date: April 12, 1991) Time: 8:30 a.m.) Place: Department A

BEEK; BRADBURY R. CLARK; WARREN CHRISTOPHER; O'MELVENY & MYERS, a California partnership; and DOES 1 through 400, inclusive, Defendants.	) Discovery Cut-Off: none) Motion Cut-Off Date: none) Trial Date: None

The motion of defendants Newman, et al. to dismiss for delay in prosecution came on regularly for hearing on April 12, 1991, at 8:30 a.m., in Department A of the above-entitled court, the Honorable Richard Montes, presiding. Kenneth W. Anderson appeared for the defendants, and Brian N. Beyer appeared for plaintiff.

IT IS HEREBY ADJUDGED AND DECREED that plaintiff's original complaint dated December 4, 1987 and plaintiff's first amended complaint dated January 4, 1988 are dismissed with prejudice. The

action is dismissed in its entirety, pursuant to California Code of Civil Procedure § 583.410 and Rule 373 of the California Rules of Court, for failure to bring to trial within three years.

IT IS FURTHER ADJUDGED AND DECREED that plaintiff shall pay all costs and disbursements incurred by defendants.

DATED: April 23, 1991

RICHARD MONTES

_____

Honorable Richard Montes
Judge of the Superior Court

The Superior Court

NORTHEAST DISTRIC
300 EAST WALNUT STREET
PASADENA, CALIFORNIA 91101

TO ATTORNEY OF RECORD

Your case has been assigned to the Master Calendar Trial Delay Reduction Program in the Los Angeles County Superior Court. It is your responsibility as an attorney to immediately familiarize yourself with the detailed plrovisions of the *Los Angeles County Superior Court Rules*, Local Rules, Chapter 13. A reading of this notice does not relieve you of the responsibility to become intimately familiar with the requirements of these rules. The following critical provisions are summarized for your assistance in avoiding immediate and severe rule violations.

APPLICATION

The Chapter 13 Rules are effective July 1, 1992. The Chapter 13 Rules shall apply to all civil cases filed in or transferred to the Northeast District and assigned to Master Calendar for all purposes

PRIORITY OVER OTHER RULES

All court policy statements and policy manual will be applicable, if appropriate, except to the extent that they are inconsistent with Chapter 13 Rules or any orders made thereunder.

TIME STANDARDS

Cases filed on or after July 1, 1992, will be subject to processing under the following time standards:

COMPLAINTS: All complaints shall

be served within 60 days of filing and a proof of service shall be filed within 90 days of filing.

CROSS-COMPLAINTS: Without leave of Court first being obtained, no cross-complaint may be filed by any party after its answer is filed. Cross-complaints shall be served within 30 days of the filing date and a proof of service filed within 40 days of the filing date.

DISCOVERY REGULATION: The Court shall regulate the timing, scope and completion of all discovery, including discovery pursuant to Code Civil Procedure Section 2034 consistent with Government Code Section 6816(f) and Code of Civil Procedure Sections 2016 through

2036.

AT-ISSUE MEMORANDUM: The at-issue memorandum must be filed within 180 days of filing of the complaint.

EXISTING CASES: Cases filed prior to July 1, 1992, with an existing case management or status conference order will be processed by the clerk in accordance with the provisions of Chapter 13 Rules.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF LOS ANGELES

		CASE NUMBER _____
	Plaintiff(s),	STATUS CONFERENCE QUESTIONNAIRE
vs.		
	Defendant(s).	_____
		STATUS CONFERENCE Date: Time: Place: Dept.__

NOTICE to all counsel of record and parties in propria persona: All parties of record must complete in its entirety a Status Conference Questionnaire and serve and file it directly in Department "A". Do not file or submit this questionnaire in advance of the status conference date. If the space provided for any answer is insufficient, attach additional pages as needed.

PARTY (i.e. Plaintiff/Defendant /Cross-Complaint) Answering this counsel for such party:	
Date on which the complaint was filed:	DATE ON WHICH THE CROSS COMPLAINT WAS FILED:

IF THE DATE BY WHICH THE CASE MUST BE TRIED UNDER CCP 583.310 HAS BEEN TOLLED OR EXTENDED FOR ANY REASON, SET FORTH THE EXTENDED DATE AND STATE, IN DETAIL HOW THAT EXTENDED DATE WAS COMPUTED.

NATURE OF THE CASE (Check the appropriate box.) ☐ Vehicle Accident ☐ Medical Malpractice ☐ Bad Faith ☐ Assault and Battery ☐ Slip and Fall ☐ Legal Malpractice ☐ Wrongful Termination ☐ Police Misconduct ☐ Premises Liability ☐ Real Property ☐ Business Litigation ☐ Other_____ ☐ Wrongful Death ☐ Product Liability ☐ Collection
PARTIES - list the name of each party in the following categories:
1. PLAINTIFF/CROSS COMPLAINT
2. DEFENDANT/CROSS DEFENDANT WHO HAS ANSWERED OR WHOSE DEFAULT HAS BEEN ENTERED:
3. DEFENDANT/CROSS DEFENDANT WHO HAS BEEN SERVED AND HAS NOT YET FILED A RESPONSIVE PLEADING AND WHOSE DEFAULT HAS NOT BEEN ENTERED:

4. DEFENDANT/CROSS DEFENDANT WHO HAS NOT BEEN SERVED:
RELATED CASES-see local rule 1303.6
ARE THERE ANY OTHER CASES THAT HAVE BEEN DESIGNATED AS "RELATED CASES' BY THE COURT? ☐ YES ☐ NO
IF YOUR ANSWER IS "YES", SET FORTH THE CASE NUMBER OF SUCH CASE(S).
ARE THERE ANY OTHER CASES THAT YOU CONSIDER TO BE "RELATED CASES"? ☐ YES ☐ NO
IF YOUR ANSWER IS "YES", SET FORTH THE CASE NUMBER OF SUCH CASE(S).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Plaintiff(s), vs. Defendant(s).	CASE NUMBER PLAINTIFF'S ELECTION TO ARBITRATE (Conference set on _____ in Dept. _____

Plaintiff(s) elect(s) to arbitrate this case pursuant to CRC section 1600(b) and agree(s) that the arbitration award shall not exceed the total sum of $50,000.00(for each plaintiff).

Dated:_____ _____

ATTORNEY FOR PLAINTIFF(S)

PROOF OF SERVICE

State of California, County of Los Angeles

I, do hereby certify that I am not a party to the above entitled action; that on _____, 19__, I served copies hereof by depositing the same in the United States Post Office at Los Angeles, California, enclosed in a sealed envelope, with postage prepaid, addressed as follows:

_____

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on _____ at _____, California.

_____

SIGNATURE

AN AT-ISSUE MEMORANDUM MUST BE FILED IN ORDER TO PROCEED TO ARBITRATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NORTHEAST "G"

HON. GEORGE XANTHOS, JUDGE

L. SHIEH,	)
	)
Plaintiff,	)NO. NEC 63381
	)
vs.	)
	)
CHARLES PATURICK,ET AL.,	)
	)
DEFENDANT.	)
	)

REPORT'S TRANSCRIPT

MARCH 5, 1992

APPEARANCES:

FOR PLAINTIFF: BURTON SELMAN, Esq.
301 NORTH LAKE
PASADENA,
CALIFORNIA 91107

FOR DEFENDANTS GRAHAM & JAMES, CHARLES PATURICK, ET AL.: JEFFER, MANGELS, BUTLER & MARMARO
BY:KIMBERLY HOWLAND-MEYER

2121 AVENUE OF
THE STARS, TENTH
FLOOR
LOS ANGELES,
CALIFORNIA 90067

For Defendants
Sheppard, Mullin,
Richter & Hampton
and Chi-Husan, aka
Jack C. Liu;

SHEPPARD, MULLIN,
RICHTER & HAMPTON
BY:FRED R. PUGLISI
333 South Hope St.
48th Floor
Los Angeles,
California 90071

ELSIE J. AMAYA,
CSR #871
Official Reporter

GIVEN, THAT MR. SHIEH DID NOT PURSUE HIS CASE DILIGENTLY AS HE SHOULD HAVE, WHICH IS THE PRECURSOR TO WHY WE HAVE FAST-TRACK DOWNTOWN.

IT IS THIS KIND OF INACTION THAT HAS BROUGHT ABOUT OUR SO-CALLED FAST-TRACK, AS PROMULGATED BY THE SUPREME COURT, AND AS AUTHORIZED AND PUSHED BY CHIEF JUSTICE MALCOLM LUCAS.

AND, BECAUSE OF THAT INACTION, AND BECAUSE OF HIS FAILURE TO RESPOND TO THE POINTS THAT WERE RAISED BY OPPOSING COUNSEL, I FIND NO REASON WHY I SHOULD NOT DISMISS THIS CASE, AND, ACCORDINGLY, THAT IS MY RULING.

MR. SELMAN: MAY I MAKE A COMMENT?

THE COURT: YES, YOU MAY.

MR. SELMAN: MR. SHIEH IN HIS DECLARATION SAYS THAT MR. MARMARO WROTE

HIM A LETTER, NAMELY, EXHIBIT "B," SAYING THAT HE WOULD SUE THE LAW FIRM THAT MR. SHIEH WAS ASSOCIATED WITH, LEWIS, D'AMATO, BRISBOIS AND BISGAARD, IF MR. SHIEH ACTIVELY PURSUED OR BROUGHT A SUIT AGAINST GRAHAM AND JAMES, SO MR. SHIEH SAYS HE DID NOT BRING THE SUIT AGAINST GRAHAM AND JAMES OR PURSUE IT ACTIVELY UNTIL HE PURSUED HIS EMPLOYMENT WITH FULBRIGHT AND JAWORSKI.

THE COURT: SO?

MR. SELMAN: THAT IS HIS REASON FOR --

THE COURT: THAT IS NOT A REASON FOR INACTION. WHY DIDN'T HE FILE --

FIRST OF ALL, SOME OF THESE DEFENDANTS WERE NOT SERVED FOR OVER A YEAR; ISN'T THAT CORRECT?

MR. MEYER: THAT'S CORRECT, YOUR HONOR.

THE COURT: I THINK THAT SERVICE WASN'T EFFECTUATED UPON THE DEFENDANTS FOR A YEAR PLUS "X" NUMBER OF MONTHS, I THINK.

MS. MEYER: IT WAS NEARLY TWO YEARS.

THE COURT: ALMOST TWO YEARS.

NOW, THAT BOTHERS ME. THAT TELLS ME THAT THERE IS SOMETHING WRONG.

NOW, I CAN SEE -- AND THEN, OBVIOUSLY, THAT THEN TELLS ME WHY THE AT-ISSUE WASN'T FILED.

BUT EVEN AFTER THEY RESPONDED, FIVE MONTHS HAVE GONE BY AND STILL NO AT-ISSUE MEMORANDUM.

NOW, EITHER HE HAS A CASE AGAINST THESE DEFENDANTS, OR HE DOES NOT HAVE A CASE, BUT HE IS DOING NOTHING MORE, I THINK, THAN TRYING TO THWART THE ENTIRE PRINCIPLE, THE FAST-TRACK, AND THE ENTIRE PRINCIPLE OF EXPEDITING CASES AND GETTING THEM THROUGH THE JUDICIAL PROCESS.

NOW, I RECOGNIZE, AND I AM GOING TO PUT THIS ON THE RECORD BECAUSE I DO

RECOGNIZE, IT'S THE POLICY OF OUR COURT AND OUR JUDICIAL SYSTEM TO TRY CASES ON THEIR MERITS.

HOWEVER, BECAUSE OF THE INACTION OF MR. SHIEH, I THINK THAT OVER A PERIOD OF TIME, SINCE DECEMBER OF '89, THAT ANY FURTHER CONTINUANCE OF THIS CASE, INSOFAR AS LETTING IT STAND, WOULD SERVE AS A DISSERVICE TO THE DEFENDANTS BECAUSE THEY ARE ENTITLED TO JUSTICE JUST AS WELL AS THE PLAINTIFF IS, AND I THINK IT'S HIGHLY PREJUDICIAL TO THEM TO LET THIS MATTER GO ON.

ACCORDINGLY, THE CASE WILL BE DISMISSED.

DECLARATION OF JED MARK SILVERSTROM IN OPPOSITION TO COURT'S ORDER TO SHOW CAUSE RE DISMISSAL

I, JED MARK SILVERSTROM, DECLARE:

1. The facts stated herein are true of my own firsthand personal knowledge and if called as a witness, I could, and would testify thereto under oath.

2. As of October 21, 1991, I have been associated counsel for Plaintiff L. Shieh ("Shieh") in this action.

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

3. I was first retained as counsel in this case on or about October 9, 1991. Had Mr. Shieh sought to retain me to represent him in this case prior to that time, I would have refused due to the press of other litigation I was handling.

4.Between October 9, 1991 and October

15, 1991, I reviewed the case files and researched the applicable law. By October 15, 1991, I determined that many of the causes of action of the complaint are probably subject to demurrer, that certain causes of action should be dropped, and that other causes of action should be added to the complaint. That same date, I telephoned the Court clerk and reserved a December 6, 1991, hearing date for a motion for leave to file an second amended complaint ("the Motion to Amend"). The Court clerk told me that this date, nearly two months away, was the earliest date on which the Motion to Amend could be heard. I had the Motion to Amend filed with the Court on October 22, 1991. The Motion to Amend was set for hearing on December 6, 1992.

5.Nearly a month later, on November 18, 1991, I received stipulate to the

filing of the Second Amended Complaint confirmed in my mind that he planned to oppose the Motion to Amend through Puglisi.

22.On December 17, 1991, Susan C. V. Jones notified me that the GJ related defendants would make an application for an order extending their time to respond to the First Amended Complaint. On December 18, 1991, I appeared in Department SW "A" of this Court to oppose that application. The Honorable Richard Montes heard argument of counsel on the application. During the hearing, the Court asked me when this action was commenced. When I told the Court that the action had been commenced on December 28, 1989, the Court responded: "We have to enact Chapter 13." Although the Court did not explain, it is apparent that the Court was referring to

the Trial Court Delay Reduction Rules in Chapter 13 of the Superior Court's Local Rules, which were not applicable Northeast District. The Court's clerk then came over and spoke to the Court, after which the Court asked whether there was a order to show cause re dismissal pending for this action. I told the Court that there was and that it was scheduled to be heard on January 6, 1992. The Court then announced that it would grant the application and give the GJ Defendants until Saturday, February 15, 1992. I objected that this would further impede Shieh's ability to bring this case to trial and that Shieh had a right to move the case along as much as possible before the hearing on the OSC re dismissal. I also objected that under CCP §1054(a), the Court could not extend the time for defendants to

respond to the complaint for more than 30 days without Shieh's consent and Shieh did not consent to such an extension of defendants' time to respond. The Court did not change its ruling. Since the GJ Defendants' responses to the First Amended Complaint were due on December 23, 1991, the Court extended their time to respond 54 days. Realistically, this extension of time was probably 50 days since the date to respond was set for Saturday.

DISCOVERY CONDUCTED

23. Paragraphs 24, through 50, below, describe the discovery I have initiated in this action.

Depositions of Coudert Brother, Barrye Wall, Deborah Eisen

24. On November 4, 1991, I had deposition subpenas served on Barrye L. Wall ("Wall") and on Coudert Brothers

("CB"). I conducted the depositions of these witnesses on November 14, 1991. Before I even began the depositions, I informed the deponents' counsel, David Jacobs ("Jacobs"), that no defendants were appearing at the deposition because they disputed whether they had been properly served with the summons and complaint in this action. No one in fact appeared at these depositions for any of the defendants in this litigation.

25. Based on what I learned during the November 14, 1991 depositions, I had another deposition subpoena served on CB on November 22, 1991, with the deposition scheduled for December 2, 1991, and had a deposition subpoena served on Deborah Eisen, an attorney with CB, on or about November 25, 1991, with the deposition scheduled for

December 5, 1991.

26.On or about November 27, 1991, I received a telephone call from Wall. He told me that he would be designated by CB to provide testimony on its behalf. He said that his counsel Jacobs be aware that Judge Gadbois has stayed his ruling granting summary judgment.

62.In paragraph 15 of the Eisen Declaration, Eisen states that Shieh contended that he was not personally served in a malicious prosecution action which he filed against Shieh ("Fulbright"). I specially appeared as counsel for the defendants in Fulbright and made a motion to quash service of summons in that action on Shieh's behalf. On December 31, 1991, I appeared before the Honorable Edward Y. Kakita, Judge Los Angeles County Superior Court, for the hearing on this

motion to quash. Judge Kakita did not believe the declaration of Eisen's process server and granted Shieh's motion to quash service of the summons.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

DATE: January 3, 1992

_____

JED MARK SILVERSTROM

SUPERIOR COURT OF THE STATE OF

CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NORTHEAST "G"

HON. GEORGE XANTHOS, JUDGE

L. SHIEH,	)
	)
Plaintiff,	)NO. NEC 63381
	)
vs.	)
	)
CHARLES PATURICK,ET AL.,	)
	)
DEFENDANT.	)
	)

REPORT'S TRANSCRIPT

April 16, 1992

APPEARANCES:

FOR PLAINTIFF: LANCE HADDIX
301 North Lake Avenue
Seventh Floor
Pasadena,California
91101

FOR DEFENDANTS GRAHAM & JAMES, CHARLES PATURICK, ET AL.: JEFFER, MANGELS, BUTLER & MARMARO BY: KIMBERLY

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STARS, TENTH FLOOR
LOS ANGELES,
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For Defendants
Sheppard, Mullin,
Richter & Hampton
and Chi-Husan, aka
Jack C. Liu;

SHEPPARD, MULLIN,
RICHTER & HAMPTON
BY:FRED R. PUGLISI
333 South Hope St.
48th Floor
Los Angeles,
California 90071

ELSIE J. AMAYA,
CSR #871
Official Reporter

And you know. You certainly are a practicing lawyer and you know that the attitude of the Supreme Court, and particularly Justice Lucas, is to expedite cases through the civil process and, hence, why we have fast track downtown and while we are adopting Rule 13 here in the Northeast District in which time limits are going to be set, is to insure that cases proceed on their merits and I agree with Mr. Shieh and you, that cases should be tried on their merits.

Unfortunately. Mr. Shieh did not take that into account in the processing of his litigation.

Thirdly, he filed affidavits of prejudice, affidavits of actual prejudice, against Judge Montes, against

Judge Swart and against myself.

But for the fact that Judge Swart was ill with an embolism in his leg, he would have responded.

I told Mr. Shieh and his attorney at that time, whoever that may have been, that I was going to do the same thing. I was going to respond and I did respond, and by stipulation we all agreed that Judge Torres should hear his 170.1 affidavit.

Subsequent to my response, he filed a supplemental declaration which I, under the cases, was of the view that I did not have to respond because, and I will repeat again, I have no recollection of ever meeting Mr. Shieh.

I may have met him and he certainly didn't impress me so that I would remember who he was.

Consequently, I had no feelings one way or the other.

PROOF OF SERVICE

STATE OF CALIFORNIA,

COUNTY OF LOS ANGELES

I am in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my address is: 301 North Lake Avenue, 7th Floor, Pasadena, CA 91101. on March 26, 1993, I served the foregoing document described as PETITION FOR WRIT OF CERTIORARI on all interested parties in this action.

( ) by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:
(X) by placing ( ) the original (X) a true copy thereof enclosed in sealed envelopes addressed as follows:

Kenneth W. Anderson
Jeffrey F. Webb
Gibson, Dunn & Crutcher

333 South Grand Avenue
Los Angeles, CA. 90071-3197

Clerk of California Supreme Court
300 South Spring Street
Second Floor
Los Angeles, CA. 90013
(1 original & 1 copy)

(X) By Mail

(X) I deposited such envelope in the mail at Pasadena, California. The envelope was mailed with postage thereon fully prepaid. practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Executed on March 26, 1993, at Pasadena,

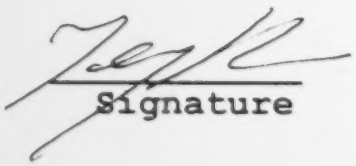
California.

( ) BY PERSONAL SERVICE I delivered such envelope by hand to the offices of the addressee. Executed on March 26, 1993, at Pasadena, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

( ) (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Terry Pan
Type or Print Name


Signature

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